

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 2007-51
	)	
TNGONG LIN CHEN,	)	
	)	
Defendant.	)	
_____	)	

ATTORNEYS:

Everard A. Potter, AUSA  
St. Thomas, U.S.V.I.  
*For the Plaintiff,*

George Hodge, Jr., Esq.  
St. Thomas, U.S.V.I.  
*For the defendant.*

MEMORANDUM OPINION AND ORDER

GÓMEZ, C.J.

Before the Court is the motion of the defendant, Tngong Lin Chen ("Chen"), to dismiss Count One of the indictment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Chen was charged in a four-count indictment. Count One charged Chen with violating 18 U.S.C. § 1028(a)(4).<sup>1</sup> Count Two

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<sup>1</sup> 18 U.S.C. § 1028(a)(4) provides:

- (a) Whoever, in a circumstance described in subsection (c) of this section--
  - (4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication

charged Chen with violating 18 U.S.C. § 1001(a)(2).<sup>2</sup> Counts Three and Four respectively alleged violations of 18 U.S.C. §§ 911 and 1028A(a)(1).<sup>3</sup>

At the close of the government's case-in-chief at a trial by jury, Chen moved to dismiss all four counts in the indictment pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

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feature, or a false identification document, with the intent such document or feature be used to defraud the United States.

<sup>2</sup> 18 U.S.C. § 1001(a)(2) provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(2) makes any materially false, fictitious, or fraudulent statement or representation

<sup>3</sup> 18 U.S.C. § 911 provides:

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 1028A(a)(1) provides:

(a) Offenses

(1) In general. Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

The Court granted the motion as to Counts Three and Four. The Court denied the motion as to Count Two and reserved judgment on the motion as to Count One. Counts One and Two were submitted to the jury. The jury returned a guilty verdict on both counts. Chen now renews his motion to dismiss Count One.

First, Chen argues that he was exposed to double jeopardy because of allegedly multiplicitous charges in the indictment. In support of that argument, Chen asserts that Count One specified that he was in possession of a New York State driver's license, while Count Four specified that he possessed a New York State identification card. The evidence at trial showed that Chen possessed only the latter. Chen contends that because the identification document alleged in the indictment differed from that which Chen actually possessed,

the jury did not pause to consider that the New York State Identification Card and the New York driver's license were not the same document despite of the Court's jury instruction.

(Def.'s Amended Mot. to Dismiss Count I with Points and Authorities 3.)

Second, Chen appears to argue that there was insufficient evidence to convict him of the offense alleged in Count One because the government proved only that Chen had a New York State identification card, not a New York State driver's license.

## II. ANALYSIS

### A. Multiplicity

For the first time in these proceedings, Chen argues in this post-conviction motion that certain counts of the indictment were multiplicitous. Because Chen did not raise this indictment issue before trial, he has waived his right to raise it. *See, e.g., United States v. Brooks*, 508 F.3d 1205, 1208 (9th Cir. 2007) (Under Rule 12(b)(3) and 12(e) of the Federal Rules of Criminal Procedure a defendant waives any 'defect in the indictment' not raised 'before trial.' We have recognized that claims of multiplicity are subject to Rule 12(b)(3)."); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) ("Failure to object to a count on grounds of multiplicity prior to trial generally waives that objection."); *United States v. Whitney*, No. 92-1038, 1993 U.S. App. LEXIS 274, at \*2 (1st Cir. Jan. 12, 1993) ("Unless a defendant raises [a multiplicity] objection to the indictment prior to trial (while time remains for the government to rewrite the indictment to cure any such error), he waives the objection."); *United States v. Galvan*, 949 F.2d 777, 781 (5th Cir. 1991) ("[A] defendant must raise [a multiplicity objection] in a pre-trial motion. By not doing so, a defendant waives her objection to multiplicity in the indictment.") (internal citations omitted); *United States v. Mosley*, 786 F.2d 1330, 1333

(7th Cir. 1986) ("A party waives a claim of multiplicity if he fails to raise it before trial."), *cert. denied*, 476 U.S. 1184 (1986).

Accordingly, Chen's motion will be denied with respect to his multiplicity argument.

**B. Sufficiency of the Evidence**

The second basis of Chen's motion appears to be that the evidence at trial differed materially from the charges in Count One of the indictment, thereby creating a fatal material variance requiring a judgment of acquittal.

A variance exists where the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. *United States v. Daraio*, 445 F.3d 253, 261 (3d Cir. 2006) (internal quotations omitted). In order for this Court to grant the relief Chen requests, Chen must show (1) that there was a variance between the indictment and the evidence adduced at trial and (2) that the variance prejudiced some substantial right. *United States v. Balter*, 91 F.3d 427, 441 (3d Cir. 1996). To show prejudice required to establish a fatal variance between the indictment and the evidence, Chen must generally show: (1) that the indictment failed to sufficiently inform him of the charges against him so that he could prepare his defense and not be misled or surprised

at trial, or (2) that the variance created a danger that Chen could be prosecuted for a second time for the same offense.

*United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir. 1978).

Here, there is undoubtedly a variance between the indictment and the evidence at trial. The indictment specified that Chen possessed a New York State driver's license while the evidence at trial showed that Chen in fact possessed a New York State identification card. The Court must determine whether that variance prejudiced Chen's substantial rights.

"Acknowledging that the proof at trial cannot mirror the allegations in the indictment, courts have afforded a reasonable amount of flexibility to the government and will not find a variance fatal, so long as the defendant was given notice of the 'core of criminality' sought to be proven at trial." *United States v. Williams*, Nos. 97-4464, 97-4603, 97-4776, 97-4777 and 97-4809, 1998 U.S. App. LEXIS 26540, at \*9 (4th Cir. Oct. 16, 1998) (citing *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992); *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983)). Thus, in *Williams*, the Fourth Circuit Court of Appeals did not find the defendant's substantial rights to have been prejudiced where the indictment alleged that he submitted a Form 1040 and a Form 8453 to the Internal Revenue Service, but the

evidence at trial showed that in fact he had submitted a Form 1040A. 1998 U.S. App. LEXIS 26540, at \*8.

Here, the indictment provided Chen with adequate notice of the core offense charged in Count One, thus enabling him to prepare a defense.<sup>4</sup> *See, e.g., Daraio*, 445 F.3d at 262. Thus, any detail in the indictment about the particular identification document that Chen was alleged to possess was "mere surplusage." *See, e.g., United States v. Williams*, 334 F.3d 1228, 1231 (11th Cir. 2003) (stating that the fact that the gun in the 18 U.S.C. § 924(c) count was an "AK-47 rifle" and not a "handgun" as charged in the indictment did not impair the defendant's substantial rights because "the word 'handgun' in the indictment was mere surplusage"); *see also United States v. McIntosh*, 23 F.3d 1454, 1457 (8th Cir. 1994) ("Allegations in the indictment that are not necessary to establish a violation of a statute are surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime."). Moreover, the specific type of identification document is not an element of an 18 U.S.C. § 1028(a)(4) offense. *See, e.g., Archie v. Strack*, 378 F. Supp. 2d 195, 199 (W.D.N.Y. 2005). The evidence at trial showed that Chen possessed a New York State identification card bearing a name

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<sup>4</sup> In fact, at trial the government stated that the only identification document proved at trial -- the New York State identification card -- was provided to Chen during discovery.

other than his own, and that Chen presented that identification card to a Customs and Border Protection agent as if it were his own. That evidence, taken in a light most favorable to the government, was sufficient for a rational jury to find Chen guilty of the offense alleged in Count One.

The indictment was also sufficiently particular as to protect Chen from multiple prosecutions for the same offense. See *Williams*, 1998 U.S. App. LEXIS 26540, at \*10.

For the reasons stated above, it is hereby

**ORDERED** that the motion to dismiss Count One of the indictment is **DENIED**.

**Dated: February 12, 2008**

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

Copy:       Everard A. Potter, AUSA  
             George Hodge, Jr., Esq.